No. 21,743

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

Brief for Respondent

On Petition for Enforcement of an Order of the National Labor Relations Board

---

JOSEPH R. GRODIN
NEYHART, GRODIN & BEESON
235 Montgomery Street
San Francisco, California 94104
Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Statement of the Case	1
Argument	3
The Board Erred in Concluding That the Union Caused the Discharge of Employee Phillip Havill Because He Was Not a Union Member, in Violation of Section 8(b) (2) and (1) (A) of the Act	3

TABLE OF AUTHORITIES CITED

Cases	Page
Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961)	3
Graham v. Retail Clerks, 47 LRRM 2009 (D. Mont. 1960)	3
McLeod v. Chefs, Cooks Local 89, 280 F.2d 760 (2nd Cir. 1960)	3
NLRB v. C&C Plywood Corp., 351 F.2d 224 (9th Cir. 1965)	6
NLRB v. Huber & Huber Motor Express Co., 223 F.2d 748 (5th Cir. 1955)	3

No. 21,743

In the
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

Brief for Respondent

On Petition for Enforcement of an Order of the National Labor Relations Board

---

STATEMENT OF THE CASE

The Statement of the case contained in the Board's Brief, accurate enough as far as it goes, requires supplementation for an understanding of Respondent's position.

The Board made certain Findings of Fact to the effect that initial communications between the Union and both Havill and Chadbourne made reference to the fact that Havill was not a union member. While Respondent does not agree with all those Findings, it concedes that they are supported by substantial evidence within the meaning of applicable criteria limiting the scope of judicial review.

Even on the basis of the Findings, however, it is clear that the Union's references to Havill's non-membership status were limited to the period of time prior to the second meeting between Union representatives and Chadbourne. No mention of Havill being "non-union" was made after the first meeting. At the second meeting, all discussion centered around the Union's contention that Havill had been hired in violation of the hiring hall provisions of the collective bargaining agreement (Vol. I Tr., p. 18, l. 26 - p. 19, l. 26). Mazzola proposed that Havill be sent down to register on the out-of-work list, but Chadbourne refused (Vol. I Tr., p. 7, lines 1-7). Mazzola then proposed that the issue between the parties with respect to the Union's contention be submitted to the Joint Hiring Committee provided for in the collective bargaining agreement, and again Chadbourne refused. (Id. lines 8-12). At the hearing, Chadbourne stated his reason for refusing to follow the contractual procedure as follows:

> "I wasn't interested in having any meeting. The only thing I was interested in at that time was not to have any problems. I wanted to just work out a solution some way because I knew that any type of meeting that would be had, I would not have much of a chance of getting a point over."

Prior to the second meeting, Chadbourne had discussed with his attorney questions relating to the legality of the Union's hiring hall (Vol. I Tr. p. 18, lines 19-24); and during the second meeting both Chadbourne and Mazzola discussed such questions by telephone with the attorney for the Union (Vol. I Tr. p. 19, lines 14-26). Finally, after the second meeting, Mazzola sent Chadbourne a letter requesting that Havill be dismissed from employment for the reason that he was hired contrary to the provisions of the agreement (Vol. I Tr. p. 19, lines 31-37).

ARGUMENT

The Board Erred in Concluding That the Union Caused the Discharge of Employee Phillip Havill Because He Was Not a Union Member, in Violation of Section 8(b)(2) and (1)(A) of the Act.

Concededly there is sufficient evidence in the record to sustain a finding that initially the Union was unhappy because Havill was not a member; but the Board's conclusion that such unhappiness was the motivation behind the Union's ultimate request for his termination rests upon much less stable ground.

If an employee is discharged for a lawful reason, the presence of an antipathy based upon considerations of union membership does not make the discharge unlawful. *Frosty Morn Meats, Inc. v. NLRB,* 296 F.2d 617 (5th Cir. 1961); and the Board may not infer an unlawful motive if it could just as reasonably infer a lawful one. *NLRB v. Huber & Huber Motor Express Co.,* 223 F.2d 748 (5th Cir. 1955). Moreover, a party may change its reason for undertaking a particular act from an unlawful to a lawful one, and the Board has often been criticized by the courts for failing to consider evidence of such a change in position. *E.g., McLeod v. Chefs, Cooks Local 89,* 280 F.2d 760 (2nd Cir. 1960); *Graham v. Retail Clerks,* 47 LRRM 2009 (D. Mont. 1960).

In fact, the Board did not seriously consider the Union's argument that after the first meeting it was proceeding solely on the basis of its opinion that the hiring hall provisions of the contract had been violated; and a careful reading of the Trial Examiner's opinion adopted by the Board makes clear that at least one of the reasons for ignoring the Union's argument was the Trial Examiner's conclusion that the Union's position with respect to the hiring hall was

legally incorrect.[1] In reaching that conclusion, the Trial Examiner (and the Board) ignored the realities of the operation of a hiring hall; and they overstepped their own jurisdiction by positing their own interpretation of the agreement as the only legally correct one, without regard to the Union's offer to submit the issue to the contractual grievance procedure.

The issue concerns the meaning of Article II, Section 7 of the agreement (G.C. Ex. No. 7), which provides that "If the Union is unable to furnish qualified workmen within 48 hours after an Employer calls for them, the Employer shall be free to procure the workmen from any other source or sources". Assume, for purposes of argument, that an employer places a call with the union's dispatcher at 9:00 o'clock on Monday morning for a steamfitter capable of performing boiler control work. Assume, further, that the out-of-work list contains the names of 50 steamfitters at the time the call comes in. Assuming there is no question as to the *bona fides* of the employer's request (i.e., that he is not using a special skills call to get a particular applicant off the list, or to avoid using the list), the contract requires the Union to honor the request by dispatching "persons possessing such skills and abilities in the order in which their names appear on the out-of-work list". (Art. II, Sec. 5(c)). The dispatcher makes that determination on the basis of information supplied by the applicant, and his own knowledge, if any, of the applicant's skills and abili-

---

1. It is true that the Board in its opinion (Vol. I Tr., p. 38, fn. 2) finds it unnecessary to rely upon the reasoning contained in the ultimate paragraph of the Trial Examiner's opinion, to the effect that the decision would be the same even if it were found that Respondent acted in good faith in invoking the contractual provisions; but the implication that Respondent acted in bad faith rests in substantial part upon the Board's interpretation of the contract, and is not otherwise supported by substantial evidence.

ties. (Ibid.) Assume, then, that there are 10 out of the 50 steamfitters registered on the list whom the dispatcher believes, on the basis of their representations or the dispatcher's own knowledge, are capable of performing the work in question. He dispatches the first such applicant at 9:30 on Monday morning; the applicant reports to the contractor, believing him not sufficiently qualified, rejects him. The contractor therefore calls the union a second time, with the same request. Since dispatch hours are from 8:00 a.m. to 9:30 a.m. only (Art. II, Sec. 4(g)), the second man is not dispatched until the next day (Tuesday). If the contractor rejects the second, and perhaps the third, man as well, it is obvious that 48 hours will have elapsed long before the 10 presumptively qualified men have all been dispatched. The question is as to the effect of Article II, Section 7 in such a situation.

Chadbourne, and the Board, would say that he is free to hire outside the hiring hall if the Union has not supplied him with men *he considers to be qualified* within 48 hours of his first call. Such an interpretation is not consistent with the purposes of exclusive hiring hall in a skilled craft. The contract takes elaborate pains to assure that the skills level of the applicants on the out-of-work list will be maintained. They must have at least five years experience in the trade, and they must show qualifications by having completed an apprentice program, by passing an examination, or by evidence of previous satisfactory employment with a signatory contractor (Art. II, Sec. 1(b)). The applicants are presumptively qualified to perform work covered by the agreement, and the contractor, by signing the agreement, has committed himself to hire from among them unless there are none who meet his qualifications. The Chadbourne interpretation would seriously curtail employ-

ment opportunities for qualified applicants further down the list. It would also provide an employer who desired to avoid the list in order to hire his "own" man an easy means for doing so. In that connection, it would tempt an employer to state the requisites for the job in such a way that only his "favorite" could qualify. That is what the Union believed Chadbourne was doing here.

The Trial Examiner misconceived the Respondent's interpretation of the disputed language. Respondent does *not* claim, as suggested by the Examiner (fn. 19, p. 9) that the out-of-work list must be exhausted before the contractor seeking a man with special skills could hire outside the hiring hall. Rather, it is the Respondent's position that, *assuming a bona fide request for special skills is made,* the contractor must continue to call the hiring hall for men so long as there are registered applicants who claim, or who are known by the dispatcher to possess, the requisite skills and experience. It is only when a period of 48 hours elapses without the union being able to send anyone presumptively qualified that the contractor is free, under Article II, Section 7, to hire "off the street". The phrase "qualified workmen" in Section 7 does not mean workmen whose qualifications satisfy the contractor, but workmen who, under the terms of the agreement, are presumptively qualified to perform the work. Thus, the Union was at odds with Chadbourne, who stated "I consider myself the one to qualify them, and not the Union" (*Tr. 68, line 21*).

Whether or not Respondent's interpretation of the agreement is correct, it is certainly reasonable and arguable. This court has held that, where the Board finds it necessary to "construe" the collective bargaining agreement in order to find an unfair labor practice, the Board is without jurisdiction in the face of an arbitration clause. *NLRB v. C&C Plywood Corp.,* 351 F.2d 224 (9th Cir. 1965). At the very

least, good faith insistence by a union upon its interpretation of a collective bargaining agreement, in the context of an offer to submit the issue to the contractual grievance procedure, should not be relied upon as evidence of an unfair labor practice simply because the Board does not believe that the interpretation is proper.

JOSEPH R. GRODIN
NEYHART, GRODIN & BEESON
Attorneys for Respondent

August 1967.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH R. GRODIN